IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-560

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SUPREME COURT, U.S.

ROBERT WILLIAMS

Petitioner

-vs-

THE STATE OF OHIO

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUBJECT INDEX

Objections to Jurisdiction 1

Counter Questions of Law 2

1. A state procedural rule requiring the entering of an objection to an erroneous jury instruction prior to jury's retirement for deliberation serves a legitimate state interest sufficient to preclude the Supreme Court from reviewing a state supreme court's judgment, in which it declined to consider petitioner's claim that the trial court erred in its instruction to the jury on the issue of petitioner's burden with regard to the affirmative defense of self-defense on the ground that the petitioner failed to enter a timely objection to the trial court's charge.

2. No substantial federal question arises either under the Due Process Clause or this Supreme Court's decision in Mullaney v. Wilbur, 421 U.S. 684, where a state supreme court refuses to consider petitioner's claim that the trial court erred in instructing the jury that the petitioner must prove by a preponderance of the evidence the affirmative defense of self-defense where that instruction was subsequently held by the state supreme court to be erroneous in light of its interpretation of a state statute which places upon a criminal defendant the burden of merely going forward with evidence of an affirmative defense, since the petitioner failed to object to the trial court's instruction and since he also failed to raise the issue in the state intermediate court of appeals.

3. No substantial federal question arises on direct appeal in the United States Supreme Court where a state supreme court failed to consider petitioner's claims that he was denied effective assistance of counsel and that Ohio's statutory definition of the terms "reasonable doubt" and "proof beyond a reasonable doubt" fail to satisfy due process; where petitioner failed to raise these issues in the state intermediate appellate court; and where petitioner is currently raising these issues on appeal from a denial of his post-conviction relief petition in the state appellate court.

Statement of the Case ..... 3 - 9

History of the Case ..... 3 - 4

Statement of Evidence ..... 4 - 9

Reasons for Denying the Writ ..... 9 - 13

Conclusion 13

Appendix - Ohio Revised Code, Section 2901.05(A)

BEST COPY AVAILABLE

TABLE OF AUTHORITIES

Cases

Henry v. Mississippi, 379 U.S. 443 at 446, 447 (1965) 10

Mullaney v. Wilbur, 421 U.S. 684, 691 ..... 10, 11, 12, 13

Patterson v. New York, 97 S. Ct. 2319 at 2325, 2327 (1977) . 11, 12

State v. Driscoll, 138 N.E. 376 (1922) 9

State v. Robinson, 47 Ohio St. 2d 103, 351 N.E. 2d 88 (1976) ., 10-11

State v. Williams, 51 Ohio St. 2d 112 at 117, 118 ..... 11, 12

Rules

Rule 30, Ohio Rules of Criminal Procedure 9, 10, 11, 12

Statutes

Ohio Revised Code, Section 2901.05(A) 10, 11

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TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The questions herein presented were raised in the trial court, the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The jury in the trial court found the petitioner guilty of aggravated murder with specifications and aggravated robbery. The Court of Appeals affirmed the judgment of conviction. The Supreme Court of Ohio affirmed the judgment of the trial court.

The Ohio courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

COUNTER QUESTIONS OF LAW

1. A state procedural rule requiring the entering of an objection to an erroneous jury instruction prior to jury's retirement for deliberation serves a legitimate state interest so as to preclude the Supreme Court from reviewing a state supreme court's judgment, in which it declines to consider petitioner's claim that the trial court erred in its instruction to the jury on the issue of petitioner's burden with regard to the affirmative defense of self-defense on the ground that the petitioner failed to make a timely objection to the trial court's charge.

2. No substantial federal question arises either under the Due Process Clause or this Supreme Court's decision in Mullaney v. Wilbur, 421 U.S. 684, where a state supreme court refuses to consider petitioner's claim that the trial court erred in instructing the jury that the petitioner must prove by a preponderance of the evidence the affirmative defense of self-defense where that instruction was subsequently held by the state supreme court to be erroneous in light of its interpretation of a state statute which places upon a criminal defendant the burden of merely going forward with evidence of an affirmative defense, since the petitioner failed to object to the trial court's instruction and since he also failed to raise the issue in the state intermediate court of appeals.

3. No substantial federal question arises on direct appeal in the United States Supreme Court where a state supreme court failed to consider petitioner's claims that he was denied effective assistance of counsel and that Ohio's statutory definition of the terms "reasonable doubt" and "proof beyond a reasonable doubt" fail to satisfy due process; where petitioner failed to raise these issues in the state intermediate appellate court; and where petitioner is currently raising these issues on appeal from a denial of his post-conviction relief petition in the state appellate court.

STATEMENT OF THE CASE

History of the Case

On April 10, 1975 the petitioner Robert Williams, along with Kenneth Duncan, Donald Hicks and Patricia Forgus were indicted for the crime of aggravated murder with the specifications that the murder was committed while the defendants were committing an aggravated robbery (Ohio Revised Code, Section 2903.01) and for the crime of aggravated robbery (Ohio Revised Code, Section 2911.01).

On April 11, 1975, at his arraignment, petitioner entered pleas of not guilty to both counts of the indictment.

On May 12, 1975 petitioner stood trial before a jury which, after hearing the evidence presented by both the respondent and petitioner, and after being instructed in the law of the case, returned verdicts of guilty as charged.

On June 11, 1975, pursuant to the requisites of Ohio Revised Code, Sections 2929.03(D) and (E), the trial court sentenced the petitioner to death.

On June 17, 1976 pursuant to a properly perfected appeal the Court of Appeals for the Eighth Judicial District of Ohio in an unpublished opinion, affirmed the judgment of the trial court (Court of Appeals Case No. 34902).

On July 13, 1976, petitioner filed with the trial court a petition for relief after judgment pursuant to Ohio Revised Code, Section 2953.21 predicated upon the claim that the petitioner was denied effective representation of counsel at his trial.

On February 16, 1977 the trial court conducted a hearing on petitioner's petition for post-conviction relief. On March 21, 1977, the trial court denied and dismissed the petitioner's petition ruling that the "defense counsel's failure to file pre-trial motions to suppress evidence or to ask for a continuance were of not such failures to act herein as to constitute deprivation of effective representation of counsel; that had such motions been filed, their disposition favorable to the defendant could not arguably have disposed of the criminal charges against the defendant." (Cuyahoga County Case No. CR 19331).

On July 20, 1977, the Ohio Supreme Court affirmed petitioner's conviction (State v. Williams, 51 Ohio St. 2d 112, 364 N.E. 2d 1364 (1977).

On August 22, 1977 petitioner filed with the Court of Appeals for the Eighth Judicial District of Ohio an appeal from the trial court's judgment denying post-conviction relief. Petitioner's appeal currently is pending before that Court (Court of Appeals Case No. 37811).

Statement of Evidence

Harry Feldman, seventy-one years of age (R. 30), owned two taverns in the City of Cleveland, one located at 1216 Prospect, the other at 2402 St. Clair (R. 43). He resided with Evelyn, his wife of forty years, at 11732 Lake Avenue, Apartment No. 106, Lakewood, Ohio (R. 42). Mr. Feldman stood five feet five inches, weighed 178 pounds (R. 30), and had a permanent opening into his windpipe, the result of his voicebox being removed because of cancer of the larynx (R. 37, 47).

On Saturday, April 5, 1975, the day immediately prior to his death, Mr. Feldman followed his usual daily routine, that is, he visited his two taverns in the afternoon in order to provide them with sufficient change, returned to his apartment around 6:00 p.m. for dinner, and around 10:30 p.m. returned to the taverns to collect the cash receipts which he was to deposit the following Monday (R. 44). His only deviation from that routine on this particular day was a stop he made in the afternoon at Krogers Supermarket during which he purchased some orange juice and peanut butter for his wife (R. 43). He however failed to bring the peanut butter up with him to his apartment when he returned there for dinner having inadvertently left it in his automobile (R. 43).

About 6:00 p.m. on the evening of the same day, Patricia Forgus, Donald Hicks, and the petitioner were together at an establishment called the Shrimp Boat which is located at East 55th Street and Central Avenue in the City of Cleveland. There the three of them shot some pool and "snorted" some heroin (R. 52, 53). Around 11:00 p.m. they left the Shrimp Boat and went to the home of Robert Williams, the petitioner, which was located at East 38th Street and Central Avenue (R. 54). There they remained until about two o'clock when the suggestion was made by either Hicks or Williams to pick up "the guy" (R. 97) and returned to the Shrimp Boat in a green 1969 Chevrolet (R. 55), an automobile loaned to the petitioner, Williams, by a Ronald McLoughlin (R. 153).

At the Shrimp Boat, "the guy", a Lamon Kenneth Duncan joined these three and got into the Chevrolet with them, and sat in the rear seat (R. 55). Kenneth Duncan did not know Miss Forgus, but did know both the petitioner and Donald Hicks (R. 395). When Duncan got into the Chevrolet he started talking about a robbery in the presence of the other three (R. 55).

The petitioner was behind the wheel of the Chevrolet and at the direction of Kenneth Duncan, drove the automobile to the vicinity of 1216 Prospect Avenue, whereupon seeing a little brown car that belonged to Feldman, Duncan commented that "that's the man's car," and that the man would have to go to another place to pick up some money, since his car was still there (R. 101). Thereupon the petitioner drove the car over to St. Clair Avenue to Feldman's other tavern (R. 56).

Five minutes after their arrival at the tavern on St. Clair, Harry Feldman arrived (R. 101) and went inside. Petitioner, Duncan, Hicks, and Forgus waited for about thirty minutes before Feldman came out of the tavern and got into his car (R. 58). When Duncan saw Feldman exit from the bar, he said "that's the man" (R. 59, 107) and the petitioner, along with Duncan, Hicks and Forgus (R. 59) followed Feldman west on a freeway over to the vicinity of Edgewater Park and on to Lake Avenue (R. 59) in the City of Lakewood, Ohio.

On Lake Avenue, they followed Mr. Feldman's automobile all the way to the driveway of Mr. Feldman's apartment (R. 60). When Feldman pulled his automobile into his driveway, petitioner stopped his automobile further down Lake Avenue on the same side of the street that Feldman's driveway was on and along with Duncan got out of the car (R. 61) and left to rob Mr. Feldman (R. 62).

Five or six minutes later Miss Forgus, who remained in the automobile with Donald Hicks, hearing four gunshots jumped behind the wheel of the Chevrolet and began to drive the car away from the area of Mr. Feldman's apartment (R. 62). As she was about to leave this area Donald Hicks instructed her to make a U-turn and look for his friends (R. 63), which she did. Miss Forgus, in attempting to fine the petitioner and Duncan, drove around the block bounded by Lake and Cove and Edgewater Avenues and West 117th Street (R. 64).

Meanwhile, at approximately the same time Miss Forgus heard four shots, so also did Officers O'Grady and Biscotti of the Lakewood Police Department who were patroling the area of West 117th Street and Lake Avenue at 3:20 a.m. (R. 157, 197, 173). Upon hearing these shots, they drove down Lake Avenue to investigate and eventually found Harry Feldman on his back in the driveway with his head to the northeast and his feet to the southwest (R. 157-158). Patrolman O'Grady in searching Mr. Feldman found a fully loaded revolver (State's Exhibit 14) in his right overcoat pocket (R. 159). Patrolman O'Grady further noticed that a fence adjacent to the east side of the driveway was matted down and had what appeared to be peanut butter on it (R. 161). He further observed on the driveway by this fence a lid to a Kroger peanut butter jar (R. 162, State's Exhibit 22). He also observed strewn on the driveway some glass particles (R. 164). The peanut butter on the fence, the glass particles, and the lid were collected by Detective Gates of the Lakewood Police Department and submitted to the Ohio State Bureau of Criminal Identification (R. 231, 232, 245).

Subsequently, an ambulance arrived to take Mr. Feldman to the Lakewood Hospital where he expired (R. 214). Patrolman Boomer, the ambulance driver, inventoried Mr. Feldman's personal effects and found $439.93 on his person (R. 215).

Mr. Feldman was then transferred to the Cuyahoga County Morgue where an autopsy was performed by Dr. Charles Hirsch, Deputy Coroner for Cuyahoga County. Dr. Hirsch's autopsy findings were that Mr. Feldman was shot four times. Three shots had entered his back (R. 30-31). One shot, which was the fatal one, entered his right armpit and came to rest in his left side of the chest above the breast (R. 30-31); when this shot entered him, Mr. Fedlman's arm had to be at his side (R. 36).

Mr. Feldman also had alcohol in his blood and urine which indicated he was in the subclinical state of intoxication (R. 36). His blood type was A positive (R. 38).

As Miss Forgus and Mr. Hicks were circling the area looking for the petitioner and Kenneth Duncan, they were observed by a Jeffrey Summers who was in his automobile monitoring that morning's police activity on his Citizens Band radio (R. 178). Mr. Summers had also observed a male run out

from an apartment building on Edgewater Drive running after the automobile driven at this time by Miss Forgus (R. 179). When this male who was chasing the car driven by Miss Forgus saw Mr. Summers, he ran between some apartments on Cove Avenue (R. 180). Mr. Summers relayed this information to the Lakewood Police along with a description of the male running behind the car (R. 180).

Based on this information, Patrolman Incze and Patrolman Biscotti stopped the car Forgus and Hicks were in, in the area of 12700 Lake Avenue at approximately 3:30 p.m. and arrested both occupants (R. 191).

At approximately 3:45 a.m., Mr. Charles Wilhelm, a Plain Dealer route man, was delivering papers to the Lakewood Manor Hotel at 11820 Lake Avenue when he observed the night clerk was not behind the desk, an oddity since Mr. Wilhelm was accustomed to seeing him there when he would deliver his papers (R. 208). Thinking something might have happened to him, since he walked on canes, Mr. Wilhelm looked around for him and observed him and a black male come out of one of the rooms (R. 208). Seeing this, Wilhelm left for his next stop, but was flagged down by the police who inquired of him and to whom he related what he had seen.

Based on this information, Patrolman Biscotti went to the Lakewood Manor where he found Kenneth Duncan at approximately 4:30 a.m. He placed Kenneth Duncan under arrest (R. 202).

At approximately 6:15 a.m., acting on a description broadcast to members of the Lakewood Police Department, Patrolman Fensel and Detective Gates arrested the petitioner, who fitted the broadcast description, in the area of 11820 Edgewater Drive (R. 222-223).

After the arrest of Williams, Duncan, Hicks and Forgus, the Lakewood Police Department obtained a written statement from Miss Forgus wherein she implicated herself along with Williams, Duncan, and Hicks in the plan to rob Mr. Feldman (R. 295).

Detective Robert Holmok also obtained fingerprints from each person arrested (R. 291, 292) and also their blood samples (R. 295, 296). Detective Gary Gates obtained petitioner's, Duncan's and Hick's clothing plus the fingernail scrapings removed from the petitioner (R. 234, 244, 245).

After daybreak on the sixth, the Lakewood Police Department conducted a search for the weapon used in the murder of Mr. Feldman and for any other

evidence which may have proven significant. Detective Gates was charged with collecting all this evidence (R. 230, 231). Found at 11833-11835 Edgewater Drive, approximately one block from the scene of the murder, in a window sill was a fully loaded .357 magnum (R. 239, State's Exhibit 29 and 29A). Found alongside of a guilding at 12021 Edgewater Drive and behind some bushes was a .38 caliber revolver unloaded (R. 242, State's Exhibit 10). This had mud and brown substance on it (R. 272).

All the evidence that was found on and in the vicinity of the scene of Harry Feldman's murder was submitted to the Ohio Bureau of Criminal Identification along with the petitioner's clothing and the clothing of Duncan and Hicks, and the blood samples and fingerprints of the petitioner, Duncan, Hicks, and Forgus and petitioner's fingernail scrapings (R. 245). From an analysis of all the items, the following results were obtained: Henry Dombrowski, the Bureau's Supervisor, determined that the weapon that fired the fatal bullets was the .38 caliber revolver found at 12021 Edgewater (State's Exhibit 10, R. 354). (Miss Forgus had identified this weapon as the one the petitioner had obtained a day or two prior to Mr. Feldman's death, R.65); the substance that was found on this weapon was peanut butter (R. 366, 377); the substance taken from beneath the petitioner's fingernails was also peanut butter and blood (R. 370); the substance found on petitioner's trousers was human blood Type A (R. 373); the glass particles found on petitioner's trousers were identical with the glass particles from the Kroger peanut butter jar lid found in Mr. Feldman's driveway (R. 372-373); the substance found on petitioner's jacket was peanut butter and human blood (R. 374); the substance removed from the fence adjacent to Feldman's apartment driveway was peanut butter (R. 378); a fingerprint removed from the cylinder of the fully loaded .357 magnum (State's Exhibit 29) was the fingerprint of Kenneth Duncan (R. 335); the blood types of the petitioner, Duncan, Hicks, and Forgus were O, A, O, and O respectively (R. 382).

Petitioner called only one witness, the co-defendant Kenneth Duncan. He testified that he shot Harry Feldman but that he shot him in self-defense when Feldman refused to pay him money Feldman owed him and only after Feldman pulled a weapon out of his coat (R. 401-411).

The trial court charged on the issue of self-defense, but delivered to

the jury a charge which placed upon the petitioner the onus of proving the affirmative defense of self-defense by a preponderance of the evidence.

The statement of law which had been the law of Ohio since 1871 was overturned by the Ohio Supreme Court when it decided approximately one year after petitioner's conviction in an unrelated case that "a defendant in a criminal case involving the affirmative defense of self-defense has only the burden of going forward with the evidence." (State v. Robinson, 47 Ohio St. 2d 103, 351 N.E. 2d 88).

REASONS FOR DENYING THE WRIT

1. A state procedural rule requiring the entering of an objection to an erroneous jury instruction prior to jury's retirement for deliberation serves a legitimate state interest so as to preclude the Supreme Court from reviewing a state supreme court's judgment, in which it declined to consider petitioner's claim that the trial court erred in its instruction to the jury on the issue of petitioner's burden with regard to the affirmative defense of self-defense on the ground that the petitioner failed to enter a timely objection to the trial court's charge.

Ohio's Criminal Procedural Rule 30, which is modeled in part on Federal Criminal Rule 30, precludes a party from assigning as error the trial court's giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict.

The purpose of the rule is clear. To permit counsel to sit back and not to object to an erroneous jury instruction and then to reap benefits afterwards on the appellate level would be to nurture grave miscarriages of justice. As stated by the Ohio Supreme Court:

> "Any other rule would relieve counsel from any duty or responsibility upon the trial court to give faultless instructions upon every possible feature of the case, thereby disregarding entirely the true relation of court and counsel which enjoins upon counsel the duty to exercise diligence and to aid the court rather than by silence to mislead the court into commission of error. State v. Driscoll, 138 N.E. 376 (1922).

On the other hand, to compel a party to object timely to an improper jury instruction is to provide the proper climate wherein the seeds of orderly, fair, and efficient administration of justice are allowed to grow and from which are harvested the fruits of substantial justice for all concerned.

By immediately apprising the trial court of the objection and the reasons supporting the objection, counsel gives the court the opportunity to issue the proper instructions to the jury and to avoid impending error.

This Court has held in Henry v. Mississippi, 379 U.S. 443 (1965), that:

> "A litigant's procedural defaults in state proceedings do not prevent v.. ·ication of his federal rights unless the st·te's insistence on compliance with its procedural rule serves a legitimate state interest." (at 447).

It is manifest that a "legitimate state interest" is served by the promulgation of Criminal Rule 30.

Therefore, inasmuch as the judgment of the Ohio Supreme Court rests on "adequate procedural state grounds" this Court should decline to review the judgment of the state court (Henry v. Mississippi, 379 U.S. 443 at 446).

2. No substantial federal question arises either under the Due Process Clause or this Supreme Court's decision in Mullaney v. Wilbur, 421 U.S. 684, where a state supreme court refuses to consider petitioner's claim that the trial court erred in instructing the jury that the petitioner must prove by a preponderance of the evidence the affirmative defense of self-defense where that instruction was subsequently held by the state supreme court to be erroneous in light of its interpretation of a state statute which places upon a criminal defendant the burden of merely going forward with evidence of an affirmative defense, since the petitioner failed to object to the trial court's instruction and since he also failed to raise the issue in the state intermediate court of appeals.

The Ohio Supreme Court refused to consider petitioner's claim that he was prejudiced by an erroneous jury instruction given by the trial court on the issue of self-defense.

Admittedly, the trial court's instruction on the law of self-defense was erroneous in light of an Ohio Supreme Court decision rendered on July 21, 1976, approximately one year after petitioner's conviction. (State v. Robinson, 47 Ohio St. 2d 103, 351 N.E. 2d 88 (1976).

In Robinson, supra, the Ohio Supreme Court interpreted Ohio Revised Code, Section 2901.05 subsection (A) to mean:

> "In a criminal case involving the affirmative defense of self-defense, the defendant has only the burden of going forward with the evidence of a nature and quality sufficient to raise that defense, and does

not have the burden of establishing such defense by a preponderance of the evidence." (Syllabus of State v. Robinson, supra).

Contrary to what the petitioner states, the Ohio Supreme Court in construing Revised Code Section 2901.05 subsection (A) did not hold that the state must prove the absence of self-defense beyond a reasonable doubt.

The Ohio Supreme Court refused to consider petitioner's claim of error on the grounds that he failed to object to the trial court's charge under Ohio Criminal Rule 30 and because petitioner failed to raise the issue in the intermediate court of appeals.

In arriving at its decision to refuse to consider petitioner's claim of error the Ohio Supreme Court adhered to past precedent. (See State v. Williams, 51 Ohio St. 2d 112, at 117 for a catalogue of Ohio Supreme Court decisions holding the same).

In addition the court was impressed with the overwhelming amount of evidence which underscored the petitioner's guilt.

> "Moreover, in so holding this court finds no miscarriage of justice in the instant cause. The exculpatory testimony of appellant's witness finds little support in the record. Through an array of 19 witnesses and 51 exhibits, the state presented convincing evidence indicative of appellant's guilt." (State v. Williams, supra, at 118).

Petitioner seeks now to raise to the level of a substantial federal question the trial court's instruction on the affirmative defense of self-defense by attempting to bring it within the framework of Mullaney v. Wilbur, 421 U.S. 684. However, petitioner's approach must fail in light of this Court's recent decision in Patterson v. New York, 97 S. Ct. 2319 (1977). This Court in Patterson held that New York did not violate the Due Process Clause by requiring the defendant to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance which would reduce the crime of murder to manslaughter, as long as the State had to carry the burden of proving each and every element of the crime of murder beyond a reasonable doubt. (Patterson v. New York, supra, at 2325).

In addition this Court rejected the proposition that a state "must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses. . ." (Patterson v. New York, supra, at 2327.)

In the instant case the State had to prove each and every element of the crimes of aggravated murder and aggravated robbery by evidence beyond a

reasonable doubt. The jury was instructed that the petitioner was required to prove by a preponderance of the evidence the affirmative defense of self-defense.

Even though the trial court's instruction was rendered erroneous, post facto, no substantial federal question is created by the state supreme court's refusal to entertain petitioner's claim of error on the basis of his non-compliance with Ohio Criminal Rule 30 and his failure to prosecute the issue in the intermediate court of appeals as error since the instruction as given by the trial court does not come within this court's decision in Mullaney v. Wilbur, supra, by virtue of this Court's recent decision in Patterson v. New York, supra.

3. No substantial federal question arises on direct appeal in the United States Supreme Court where a state supreme court failed to consider petitioner's claims that he was denied effective assistance of counsel and that Ohio's statutory definition of the terms "reasonable doubt" and "proof beyond a reasonable doubt" fail to satisfy due process; where petitioner failed to raise these issues in the state intermediate appellate court; and where petitioner is currently raising these issues on appeal from a denial of his post-conviction relief petition in the state appellate court.

The Ohio Supreme Court refused to consider petitioner's claim that he was denied effective assistance of trial counsel since he failed to raise this issue in the state appellate court, but raised that issue for the first time in the supreme court; likewise, the Ohio Supreme Court refused to review petitioner's claim that he was convicted under a constiutionally diluted definition of "reasonable doubt" and "proof beyond a reasonable doubt" since he did not object to this definition at the trial level as required under Ohio Criminal Rule 30 and furthermore did not litigate the issue in the intermediate appellate court.

The Ohio Supreme Court deemed petitioner's attempts at raising these issues for the first time contrary to Ohio procedural law. (State v. Williams, supra, at 117 and 119).

Petitioner, however, was not foreclosed by Ohio Law from prosecuting these claims on the state level and, in fact, did raise them in a post-conviction relief hearing pursuant to Ohio Revised Code, Section 2953.21 in the trial court.

There his claims were rejected and relief was denied, but he has appealed the trial court's judgment denying him relief under Ohio Revised Code, Section 2953.21 in the state appellate court, which matter is presently pending there. If he should not prevail in that court, he has available to him a remedy in the Ohio Supreme Court on appeal.

Inasmuch as these issues are currently being reviewed in the state appellate court for the first time, they are improvidently being urged in this Supreme Court on direct appeal.

Not only are these issues improvidently raised in this court on direct appeal, but the Ohio courts of review have not construed the meaning of the state statute defining the terms "reasonable doubt" and "proof beyond a reasonable doubt."

This Supreme Court has held that "state courts are the ultimate expositors of state law "and this Court is bound by state court constructions." (Mullaney v. Wilbur, 421 U.S. 684 at 691). Unless this court decides to act contrary to precedent, it certainly cannot pass on the constitutionality of a state statute which has not yet been construed by the state court.

CONCLUSION

We respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, JOHN T. CORRIGAN, Prosecuting Attorney for Cuyahoga County, Ohio, one of the Attorneys for the State of Ohio, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this 16th day of November, 1977, I served a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari on the Petitioner's Attorney, Gerald A. Messerman, 1100 Ohio Savings Plaza, Cleveland, Ohio, 44114, in a duly addressed envelope, with first class postage prepaid.

John T. Corrigan

Prosecuting Attorney of
Cuyahoga County, Ohio

APPENDIX

Ohio Revised Code, Section 2901.05(A)

"2901.95 Burden and degree of proof

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused."